Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

EUGENE DANIELS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

EUGENE IREDALE*
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44 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the District Court erred in failing to grant Petitioner's motion for a new trial based upon the government's knowing and intentional violation of the federal discovery rules regarding the suppression of impeachment and exculpatory evidence?

II. Whether the District Court erred in failing to grant Petitioner's motion for a new trial based upon the government's knowing and intentional presentation of false and/or perjured testimony during the trial which adversely affected the outcome of the verdict?

III. Whether the District Court erred in failing to grant Petitioner's motion for a new trial based upon newly discovered evidence where there was a clear showing of due diligence?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit are those in the caption.

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OCTOBER TERM, 1997

EUGENE DANIELS,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

INTRODUCTORY STATEMENT

The petitioner requests that a writ of certiorari be issued to review the decision of the United States Court of Appeals

for the Eleventh Circuit based on the grounds that:

1) the decision of the lower court expressly conflicts with this Court's decisions in *Kyles v. Whitley*, 115 S.Ct. 1555 (1996) and *Brady v. Maryland*, 373 U.S. 87 (1963); and

2) this Court should resolve the conflict between the various panels of the Eleventh Circuit interpreting the *Kyles* holding and the decisional law of the other circuits interpreting that decision with respect to the intentional suppression of exculpatory and impeachment evidence and the knowing and intentional use of perjured and/or false testimony by the prosecution.

Petitioner therefore respectfully requests that a writ of certiorari be issued to review the judgment of the Eleventh Circuit Court of Appeals, in *United States v. Eugene Daniels*, No. 95-8748, *reh. denied*, which affirmed the district court's decision denying Petitioner's motion for a new trial. The opinion is attached as Appendix "A" and the denial of the petition for rehearing is attached as Appendix "B".

This case presents a serious question of federal law for which the circuit courts of appeal are in direct conflict. The federal circuit courts are in need of resolution and unanimity on this important question of federal law.

OPINION IN THE COURT BELOW

On January 21, 1997, the Court of Appeals entered its memorandum decision, *United States v. Eugene Daniels*, No. 95-8748, affirming the ruling of the district court. A copy of the Eleventh Circuit's Memorandum Opinion, which is not to be published, is attached as Appendix "A".[1] On 20 June 1997, the Court of Appeals entered its Memorandum denying the petition for rehearing and rejecting the suggestion for rehearing en banc. A copy of its memorandum, which is not to be published, is attached as Appendix "B".

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[1] No other petitioner is involved in this petition.

STATEMENT OF JURISDICTION

On January 21, 1997, the Eleventh Circuit Court of Appeals entered judgment affirming the district court's decision in this case. The Eleventh Circuit's order denying rehearing was entered on June 20, 1997. This Court's jurisdiction to review the judgment of the Court of Appeals is conferred by 28 U.S.C. § 1254(1).

I. A CONFLICT EXISTS WITHIN THE FEDERAL CASE LAW WHICH MUST BE RESOLVED BY THIS COURT

The decision of the Court of Appeals in this case appears to have relied almost exclusively on the cases of *Routly v. Singletary*, 33 F.3d 1279 (11th Cir. 1994), *cert. denied*, 115 S.Ct. 2627 (1995) and *United States v. Valera*, 845 F.2d 923, 927-28 (11th Cir. 1988), *cert. denied*, 490 U.S. 1046 (1989) to to supports its position and explain the application of the *Brady* rule is sorely misplaced, as being instructive on the issue of the government's duty to disclose *Brady* and *Giglio* material to the defense to support its position

that the government did not have to correct the false testimony of Sophia Willis at the trial nor did it have to disclose the reports of the agents and the grand jury testimony of Andrea Walden.

In *Kyles v. Whitley, supra*, this Court has elaborated on the [*Bagley* materiality] standard that is to be applied in a case where the prosecution has suppressed *Brady* material. Under the first prong, the defense need not demonstrate that the suppressed evidence would have resulted in the defendant's acquittal. *Id.*, at 4956. The touchstone is "whether the government suppression "undermines confidence in the outcome of the trial." *Id.* The second prong also does not require a weighing of the inculpatory evidence versus the suppressed evidence. Here, the touchstone is "whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. *Id.* The third prong deals with "harmless error" analysis. This Court stated that "once constitutional error,

under *Bagley*, has been found, there is no need for harmless error review. *Id.* The reason for this, the Court stated, is "assuming arguendo, that a "harmless error" inquiry were to apply, a *Bagley* error could not be treated as harmless since 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,' (citations omitted), necessarily entails the conclusion that suppression must have had a 'substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* (quoting *Brecht v. Abrahamson*, 113 S.Ct. 1710, 1716 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). The fourth and final prong, applying *Bagley* materiality stresses the consideration of the suppressed evidence collectively, not item-by-item. It requires the government to consider the evidence, as a whole, in determining just when the standard of materiality is reached, and their obligation to disclose evidence to the defense has been reached. *Id.*

There now exists a conflict within the federal case law which must be resolved by this Court. Failure to do so will result in disparate procedures and results within the federal circuit courts.

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . .

STATEMENT OF THE CASE

EUGENE DANIELS (hereinafter "Petitioner"), was arrested on May 26, 1994, by Task Force members of the Drug Enforcement Agency (hereinafter "DEA") following an undercover drug sting. A federal magistrate's criminal complaint was issued against Petitioner charging him with violation of Title 21, United States Code, §§ 846 and 841(a). Petitioner was arraigned on the criminal complaint and was

subsequently ordered held without bail following a detention hearing.

On June 23, 1994, Petitioner was indicted by a federal grand jury in the District Court for the Northern District of Georgia, along with Jessica Childs, Sophia Willis, and Nathaniel Holston, and charged with violations of the Controlled Substances Act, to-wit: (1) Title 21, United States Code, §§ 846 and 841(a)(1) -- Conspiracy to Possess with the Intent to Distribute Cocaine; (2) Title 21, United States Code, § 841(a) -- Possession with Intent to Distribute Cocaine; (3) Title 18, United States Code, §§ 924© and 2 -- Aiding and Abetting the Use of a Firearm during the Commission of a Drug Felony; (4) & (5) Title 18, United States Code, §§ 111 and 1114 -- Assault on a Federal Officer; in a five-count indictment.

On July 7, 1994, Petitioner timely filed the following motions: (1) Motion for Discovery with Brief in Support; (2) Motion for Discovery and Inspection with Brief in Support; (3) Motion for Discovery of Defendant's Statements with Brief in

Support; (4) Motion for Discovery, pursuant to *Brady v. Maryland*, with Brief in Support; and (5) Motion for Early Discovery of *Brady/Agurs/Giglio* and *Jencks* Material, with Brief in Support.

On September 9, 1994, a superseding indictment was filed against Petitioner and the co-defendants.

On September 16, 1994, Petitioner was arraigned on the superseding indictment, and a not guilty plea was entered into the record before Magistrate Judge Dougherty.

On December 5, 1994, a jury trial was begun before the Honorable G. Ernest Tidwell, United States District Court Judge, Northern District of Georgia. [R5-R9]. The trial lasted approximately five (5) days, ending on December 9, 1994. Petitioner was convicted of (1) Conspiracy to Possess with the Intent to Distribute Cocaine -- in violation of Title 21, United States Code, Sections 846 and 841(a)(1), (2) Possession with the Intent to Distribute Cocaine -- in violation of Title 21, United States Code, Section 841(a)(1), and (3) Possession of a

Firearm in relation to a Drug Trafficking Crime -- in violation of Title 18, United States Code, Section 924(c). Sentencing of Petitioner was set for February 27, 2995.

On May 4, 1995, Petitioner filed a motion to set aside the verdict and motion for a new trial, with Brief in Support.

On May 5, 1995, the Government filed its response to Petitioner's motion for a new trial and to set aside the verdict. The motions were submitted to Judge Tidwell. A hearing was held by Judge Tidwell and Petitioner's motion and sentencing were continued till June 2, 1995, to allow time for Petitioner to file additional briefs on his motion for a new trial.

On May 12, 1995, Petitioner filed a supplemental motion for a new trial with brief in support.

On May 22, 1995, the government filed its response to Petitioner's motion for a new trial based upon suppression of impeachment evidence.

On May 31, 1995, Petitioner filed a Response to the Government's Motion in Opposition.

On June 2, 1995, a hearing was held before Judge Tidwell on Petitioner's motion to set aside the verdict and for a new trial. The motion was denied. Petitioner was sentenced, on Count One, to Life in Prison without the possibility of parole; on Count Two, to 40 years Imprisonment, to run concurrently with the sentence in Count One; and, on Count Three, to sixty (60) months imprisonment, to run consecutively to the sentence on Count 2.

REASONS FOR ALLOWANCE OF THE WRIT

I. THE ELEVENTH CIRCUIT COURT OF APPEALS RULING IMPROPERLY UPHELD THE DISTRICT COURT'S ERRONEOUS INTERPRETATION OF THIS COURT'S RULING IN *KYLES v. WHITLEY* REGARDING THE GOVERNMENT'S DUTY TO DISCLOSE EXCULPATORY AND IMPEACHMENT EVIDENCE AND THE KNOWING AND INTENTIONAL USE OF FALSE AND/OR PERJURED TESTIMONY

The Eleventh Circuit Court of Appeal is in direct conflict with the decisional law of this Court and the law of other circuit courts of appeal with respect to the government's duty to disclose exculpatory and impeachment evidence to the

defense. The erroneous interpretation of the decisional law extends also to the government's knowing and intentional use of perjured and/or false testimony.

In the instant case the district court denied Petitioner's motion for a new trial based upon the foregoing arguments. Though the unpublished memorandum decision does not reflect specifically what basis the Court of Appeals used to affirm the district court's decision, the government's brief provides some insight. The Eleventh Circuit relies on *Routly v. Singletary*, 33 F.3d 1279 (11th Cir. 1994), *cert. denied*, 115 S.Ct. 2627 (1995) and *United States v. Valera*, 845 F.2d 923, 927-28 (11th Cir. 1988), *cert. denied*, 490 U.S. 1046 (1989) to to supports its position and explain the application of the Brady rule.

THE DISTRICT COURT ERRONEOUSLY APPLIED THIS COURT'S DECISION IN *KYLES* AFTER DENYING THE DEFENSE MOTION FOR A NEW TRIAL WHERE IT WAS DEMONSTRATED THAT THE GOVERNMENT KNOWINGLY AND INTENTIONALLY SUPPRESSED EXCULPATORY AND IMPEACHMENT EVIDENCE

It is a settled area of law that the government has the obligation to turn over evidence in its possession that is both, favorable to the accused and material to guilt or punishment. *Kyles v. Whitley*, 115 S.Ct. 1555 (1995); *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987) (quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). Evidence is deemed material if there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Ritchie, supra* at 57 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)) (Defining "reasonable probability" as one sufficient to undermine faith in the outcome of the proceeding) (opinion of Blackmun, J.)

The facts in this case demonstrate several constitutional violations by the government: (1) that the government knew, or should have known that Sophia Willis was presenting false

testimony to the jury in Petitioner' trial; (2) that the government failed to correct and/or advise the Court that Ms. Willis was presenting false testimony to the Court and to the jury; (3) that the government failed to disclose to the defense counsel for Petitioner the report prepared, on February 10, 1993, by Agent McLeod regarding the debriefing of the CI; (4) that the government failed to disclose to defense counsel for Petitioner the identity of, and/or make available for interviewing, the CI for purposes of preparing Petitioner defense; (5) that the government failed to disclose to defense counsel for Petitioner the grand jury testimony of Andrea Walden, which called into question certain serious aspects of Sophia Willis' testimony at Petitioner' trial; (6) that the government failed to disclose to defense counsel for Petitioner the report of Agent Harvey, prepared on October 17, 1994, regarding the debriefing of a CSOI, which also called into question the credibility of Sophia Willis regarding certain aspects of her testimony at Petitioner' trial; and (7) that the government failed to disclose to defense

counsel for Petitioner the identity of, and/or make available the CSOI for interviewing by the defense in order to prepare for Petitioner' trial.

In order to establish a *Brady* violation, the defendant must prove: (1) the government's suppression of evidence; (2) the favorable character of that evidence; and (3) the materiality of the suppressed evidence. *Id.*;

1. THE SUPPRESSION OF EVIDENCE FAVORABLE TO THE ACCUSED BY THE GOVERNMENT VIOLATES DUE PROCESS

In *Brady, supra*, this Court outlined the general rule for evaluating the due process implications of a prosecutor's suppression of evidence favorable to the accused: "the suppression, by the government, of evidence favorable to the defendant violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the government." *Brady*, 373 U.S. at 87. In order to establish a *Brady* violation, the defendant must prove: (1)

the government's suppression of evidence; (2) the favorable character of that evidence; and (3) the materiality of the suppressed evidence. *Id.*

In *Kyles v. Whitley, supra*, this Court has elaborated on the [*Bagley* materiality] standard that is to be applied in a case where the prosecution has suppressed *Brady* material. Under the first prong, the defense need not demonstrate that the suppressed evidence would have resulted in the defendant's acquittal. *Id.*, at 1556. The touchstone is "whether the government suppression "undermines confidence in the outcome of the trial." *Id.* The second prong also does not require a weighing of the inculpatory evidence versus the suppressed evidence. Here, the touchstone is "whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. *Id.* The third prong deals with "harmless error" analysis. This Court stated that "once constitutional error, under *Bagley*, has been found, there is no need for harmless

error review. *Id.* The reason for this, the Court stated, is "assuming arguendo, that a "harmless error" inquiry were to apply, a *Bagley* error could not be treated as harmless since 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,' (citations omitted), necessarily entails the conclusion that suppression must have had a 'substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* (quoting *Brecht v. Abrahamson*, 113 S.Ct. 1710, 1716 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). The fourth and final prong, applying *Bagley* materiality stresses the consideration of the suppressed evidence collectively, not item-by-item. It requires the government to consider the evidence, as a whole, in determining just when the standard of materiality is reached, and their obligation to disclose evidence to the defense has been reached. *Id.*

They can be no question that, applying these standards,

the government far exceeded the bounds of constitutional propriety in suppressing the *Brady* material in this case. Petitioner has demonstrated, through the facts of the case, as well as the presentation of the suppressed evidence, that "a reasoned probability" exists which undermines the confidence of the verdict in this matter. Clearly, the government's case was made stronger, and the defense case much weaker, by suppression of the evidence. It is this very fact that dictates a new trial for Petitioner. Constitutional errors result when the "government fails to assist the defense by not disclosing information that might have been helpful in conducting cross-examination if 'such suppression of evidence, in fact, deprived the defendant of a fair trial.'" *Agurs*, 427 U.S. at 103.

2. THE MATERIALITY OF THE EVIDENCE SUPPRESSED BY THE GOVERNMENT WAS MATERIAL TO GUILT AND/OR INNOCENCE OF PETITIONER

The government knowingly suppressed the report prepared by Agent McLeod of the Drug Enforcement

Administration. The government also knowingly suppressed the report prepared by Agent Harvey of the Drug Enforcement Administration. Lastly, the government knowingly suppressed the grand jury testimony of Andrea Walden. Each of these pieces of evidence were of significant exculpatory and impeachment value, both separately and cumulatively, to the preparation and defense of Petitioner' case.

The value of Mrs. Walden's testimony before the grand jury cannot be dismissed or downplayed. The government knew that her testimony seriously contradicted and impeached that of their chief witness, Sophia Willis, in certain specific and significant areas. It was Mrs. Walden who described in perfect detail the interior of Petitioner's Smyrna apartment, while Ms. Willis did not or could not. It was Mrs. Walden who specifically stated that she had been inside of that apartment on numerous occasions and had never seen any narcotics or narcotics paraphernalia; had never seen any unusual number of white towels; and had never seen any other people living at the

apartment besides Petitioner and his family.

Furthermore, the government knew that Mrs. Walden's background was more sanitary than Ms. Willis' as she (Mrs. Walden) had no previous contact with law enforcement. Further, the government knew that Mrs. Walden had nothing to gain by testifying. She had not been arrested or charged and therefore had no incentive to lie. Ms. Willis, however, had motive and incentive to fabricate her testimony. Further, Ms. Willis' reputation could not have been measured on the same scale as that of Mrs. Walden. With that knowledge, possibly believing that Mrs. Walden would appear more credible before the jury than Ms. Willis, the admitted drug dealer, the government withheld her testimony from defense counsel for Petitioner.

The distinction between impeaching evidence and exculpatory evidence has been discarded in the Supreme Court's recent decision, *Kyles, supra.*

As to the two reports, concerning the debriefings of the

Confidential Informant and the Confidential Source of Information, the potential value of the information contained in this material is nothing short of explosive. Most of the information, contained in the reports, demonstrates that the testimony of Sophia Willis, regarding significant issues as to her prior involvement in drugs and Petitioner's involvement in the drug conspiracy, were false. Ms. Willis denied ever having conducted any previous drug sale transaction. She denied having brokered more than one previous drug deal. Both of these statements were seriously contradicted by the informants, who had been previously been debriefed by the government. Ms. Willis also stated that Petitioner introduced her to Mr. Wade sometime in 1992. That statement was contradicted by the informant, whose statement puts the introductions of both, Petitioner and Mr. Wade, at the same time by Larry Walden.

As demonstrated above, the suppressed evidence was clearly material to Petitioner's case and would have served to

undermine the jury's confidence in her testimony. Furthermore, the government knowingly presented her false and perjured testimony to the jury in the hopes that they would obtain a conviction.

THE DISTRICT COURT ABUSED ITS DISCRETION IN LIGHT OF THE DECISION IN *KYLES* FOLLOWING A CLEAR SHOWING THAT THE GOVERNMENT KNOWINGLY PRESENTED FALSE AND/OR PERJURED TESTIMONY AND WHERE THE TESTIMONY WAS SHOWN TO HAVE AFFECTED THE OUTCOME OF THE TRIAL

In *United States v. Agurs*, 427 U.S. 97 (1976), where this Court held that a *Brady* violation arises when: (1) where previously undisclosed evidence revealed that the prosecution introduced trial testimony that it knew or should have known was perjured, 427 U.S. at 103-04; (2) where the prosecution failed to volunteer exculpatory evidence never requested or requested in a general way, 427 U.S. at 108; and (3) where the government failed to accede to a defense request for disclosure of a specific kind of exculpatory evidence, 427 U.S. at 104-07. *See Kyles, supra.*

As demonstrated by the facts previously presented, the government was well aware that not only Sophia Willis, but William Darby as well, were committing perjury on the witness stand. Furthermore, some of the instances of perjury were assisted by the government counsel on direct examination.

1. DENIAL OF A DEFENDANT'S RIGHT TO DUE PROCESS AND CONFRONTATION EXISTS EVEN WHEN UNCORRECTED FALSE TESTIMONY GOES TO A WITNESS' CREDIBILITY

This Court in *Agurs, supra*, applied a "strict standard of materiality" in cases involving "prosecutorial misconduct" and "a corruption of the truth-seeking process." *Id.*, at 104. The Court stated that "where the prosecution's case included perjured testimony and . . . the prosecution knew, or should have known, of the perjury," due process is denied. *Mooney v. Holohan*, 294 U.S. 103 (1935); *Giglio v. United States*, 405 U.S. 150 (1972) ("Non-disclosure of evidence affecting the witness' credibility falls within the *Brady* rule, provided the false

[or suppressed] testimony could affect the judgment of the jury) (quoting *Napue v. Illinois*, 360 U.S. 264 (1959)). Stated more emphatically, the Court said:

> "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."
>
> *Giglio, supra*; *Napue v. Illinois*, 360 U.S. 264 (1959) ("when the state although not soliciting false evidence, allows it to go uncorrected when it appears, violates due process); *Mooney v. Holohan*, 294 U.S. 103 (1935) ("deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'"); *Pyle v. Kansas*, 317 U.S. 213 (1942).

In the instant case, the government's chief witness against Petitioner was Sophia Willis. Ms. Willis testified that she had only been involved in a drug distribution sale one previous time before her arrest. She testified further that, other than that one time, she had never been involved in drug sales or distributions. Clearly, this testimony was false based on the

debriefing of the CI by Agent McLeod in February 1993. The CI, who was determined to be reliable, specifically told the agents how he knew of Ms. Willis' involvement in drugs. He stated that he had purchased "half-kilogram" quantities of crack cocaine from Ms. Willis on several occasions. The CI stated that he had knowledge of Ms. Willis putting together other deals involving multi-kilogram quantities of cocaine and crack cocaine. This report was never made available to counsel for Petitioner prior to his trial, nor was the identity of the informant made available. Furthermore, once the government heard the answers Ms. Willis presented to these questions, it had an affirmative duty to correct them or to advise the court of the falsity of the answer. *Napue v. Illinois, supra*. The government did nothing.

Ms. Willis also testified that she had been to Petitioner Smyrna apartment on several occasions and observed drug activity in the nature of "beakers used for cooking drugs, bagging up of drugs. etc." Ms. Willis even described where

inside of the apartment these drugs were purportedly kept, noting that drugs were stored and removed from Petitioner bedroom on the first floor. At the time of this testimony, the government knew that this information was false based upon the sworn grand jury testimony of Andre Walden.

According to Mrs. Walden, "the apartment had two bedrooms, both of which were upstairs." Mrs. Walden, during her grand jury testimony, never identified Sophia Willis as ever being at Petitioner apartment in Smyrna. Furthermore, the government knew that Mrs. Walden specifically told the grand jury that she had never seen any narcotics in Petitioner' Smyrna apartment; nor had seen an unusual amount of white towels; nor had she seen any drug paraphernalia; nor had she seen anyone living there other than Petitioner and his family. The government knew of the inconsistencies in Ms. Willis' testimony, based upon Mrs. Walden's grand jury testimony, and knew further that, at the very least, the grand jury testimony, had it been made known to the defense, would

have resulted in them calling Mrs. Walden, as a defense witness, to contradict and impeach the testimony of Ms. Willis. Further, because of the inability of Ms. Willis to accurately describe the interior of Petitioner' apartment, as Mrs. Walden had done, the government knew of, or should have known that her relating of alleged events occurring there, the way she described them, were false. But again, they failed to correct that portion of her testimony and/or to make this court aware of the falsity of that testimony.

It is axiomatic that the central function of the Sixth Amendment right to cross-examination is to expose the bias and/or motivation of the witness in testifying. "Full cross-examination by defense counsel is especially critical when the witness sought to be questioned is the chief government witness.". However, without full disclosure of all exculpatory and impeaching information possessed by the government, such right had truly been denied.

THE DISTRICT COURT COMMITTED AN ABUSE OF DISCRETION IN LIGHT OF THE DECISION IN *KYLES* WHERE PETITIONER'S MOTION FOR A NEW TRIAL BASED UPON NEWLY DISCOVERED EVIDENCE WAS DENIED FOLLOWING A CLEAR SHOWING OF DUE DILIGENCE BY PETITIONER

The law is well-settled that when the reliability of a given witness may well be determinative of guilt or innocence, non-disclosure of evidence affecting credibility falls within the general rule of *Brady* and *Jencks*. *Giglio v. United States*, 405 U.S. 150 (1972); *Warden Cannon, supra* at 1277 (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)). The government has a duty to voluntarily disclose "anything exculpatory, no matter whether defendant has made "merely a general request" or "no request at all." *United States v. Agurs*, 427 U.S. 97 (1976). Constitutional errors result when the "government fails to assist the defense by not disclosing information that might have been helpful in conducting cross-examination if 'such suppression of evidence, in fact, deprived the defendant of a fair trial.'" *Agurs*, 427 U.S. at 103.

CONCLUSION

For the reasons set forth above, petitioner requests that this Court grant his petition for a writ of certiorari to review the decision of the Eleventh Circuit Court of Appeals, and set the case for briefing and oral argument.

Dated: Respectfully submitted,

EUGENE IREDALE
DAVID K. BURGESS
Attorneys for Petitioner
EUGENE DANIELS

APPENDIX

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ELEVENTH CIRCUIT COURT OF APPEALS OPINION.....1

ELEVENTH CIRCUIT COURT OF APPEALS MEMORANDUM DECISION 4

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
JANUARY 21, 1997
MIGUEL J. CORTEZ, CLERK
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

C.A. No. 95-8748
Non-Argument Calendar

D.C. Docket No. 1:94-CR-230-3-GET

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

EUGENE DANIELS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

(January 21, 1997)

Before ANDERSON, BIRCH, and BLACK, Circuit Judges.

PER CURIAM:

Appellant Eugene Daniels was convicted of conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. §§ 846 and 841(a)(1) (Count I); possession with intent to distribute cocaine, in violation of 18 U.S.C. § 924(c) (Count II); and aiding and abetting the use of a firearm during the commission of a felony, in violation of 18 U.S.C. § 2 (Count III).

Appellant raises the following issues on appeal: (1) whether the district court erred in denying Appellant's motion for a judgement of acquittal on Count I where the evidence presented failed to demonstrate the existence of a conspiracy between Appellant and Sophia Willis; (2) whether the district court abused its discretion in admitting the hearsay testimony of Sophia Willis, under the coconspirator exception, where the evidence demonstrate only a seller-facilitator arrangement; (3) whether the district court abused its discretion in denying the appellant's motion for a new trial based on the government's intentional suppression of Brady material; (4) whether the district court abused its discretion in denying the Appellant's

motion for a new trial where the evidence demonstrated that the government knowingly presented false and/or perjured testimony to the jury; and (5)

whether the district court abused its discretion in denying the Appellant's motion for a new trial based on newly-discovered evidence where the facts demonstrate Appellant's due diligence and, but for the intentional suppression by the government, the evidence might have been discovered.

After a review of the record and consideration of each of Appellant;'s arguments, we find no error on the part of the district court.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
JUNE 20, 1997
MIGUEL J. CORTEZ, CLERK
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

C.A. No. 95-8748

UNITED STATES OF AMERICA,)
)
Plaintiff-Appellee,)
)
vs.)
)
EUGENE DANIELS,)
)
Defendant-Appellant.)
)

Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19___, ____ F2d _____).

Before: ANDERSON, BIRCH, and BLACK, Circuit Judges.

PER CURIAM:

The Petition(s) for rehearing are DENIED and no member of this panel nor other judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)